United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7075

To be argued by
LEONARD G. BISCO

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7075

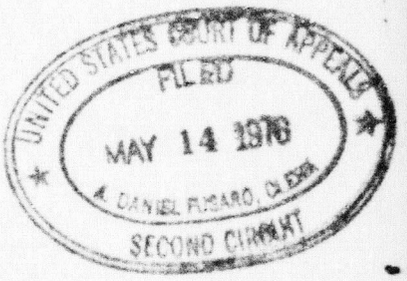
THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs-Appellees,

against

WALTER W. BREGMAN,

Defendant-Appellant.



APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

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BRIEF FOR PLAINTIFFS-APPELLEES

This appeal is by the defendant from a decision and order rendered by Honorable Constance Baker Motley, U.S.D.J. on February 17, 1976.

STATEMENT OF THE CASE

The action was originally brought by The NCK Organization Ltd. (ORG) against Walter W. Bregman for a declaratory judgment (56a*). Later, at the request of the attorneys for the defendant, it was consolidated with an action that they had brought against William E. Greene, Jr. to recover damages for his alleged breach of an option agreement given to Bregman on August 31, 1972 to purchase 5,000 shares of ORG stock (56a). The damages claimed, estimated at $45,000, but fixed at $50,000 and interest in the counterclaim filed by defendant, were based upon the claim that Bregman had a special

* Reference to Joint Appendix. All numerical references will be to the Joint Appendix unless otherwise stated.

contract with ORG dated June 17, 1970 which required ORG to purchase from Bregman, if it terminated his employment, any shares of ORG stock owned by him at current (December 31, 1973) book value, which would have given him an immediate profit of more than double the purchase price of the ORG shares under the Greene option (27a).

Bregman was the owner of 30,000 shares of ORG bought in the years 1967, 1968 and 1969 (12a). He had purchased the first 10,000 shares from Norman, Craig & Kummel Inc. (NCK) (12a) which was the former name of plaintiff ORG (11a) and which is now a wholly owned operating subsidiary of ORG. The second and third batches of 10,000 shares each were bought from Norman B. Norman and B. David Kaplan who were then the major shareholders of ORG (12a). Bregman became the president and chief operating officer of NCK (11a), he was also a director of that company and of ORG and a senior vice president of ORG (4a). Norman was president of ORG, chairman and chief executive officer of NCK and a director of each company (57a).

In August of 1972 Mr. B. David Kaplan sold all of his shares of ORG at the price of $5.47 per share. The chief purchaser was plaintiff Greene who bought 73,125 shares. Various top executives of ORG bought a total of 17,813 shares at the price of $5.47 per share. Bregman was offered the same opportunity as the other executives to buy part of the Kaplan shares at the price of $5.47 a share but he refused to buy any of these shares (13a), By agreement between Greene and ORG, dated

August 31, 1972, arranged between Norman and Greene, options were created for these same executives, as well as Bregman, each to purchase 5,000 shares at the same price of $5.47 per share (13a).

All of these executives had signed Standard Stockholders Agreements whereby they were required to hold stock for three years of employment before ORG could be required to purchase at current book value any shares of ORG owned by them at the termination of their employment. Bregman too had signed such agreements under dates of October 25, 1967 and February 6, 1968 (12a). But Bregman also had, unlike anyone else, an agreement dated June 17, 1970 which in terms required ORG to buy any of its shares owned by him at current book value in case ORG terminated his employment (57a). This agreement was signed by Kaplan and Bregman and had been drawn by Donald W. [redacted]all at the time that Bregman moved his employment from London to New York (176a). Mr. Randall was house counsel to ORG and NCK (60a). He was employed in 1967 and his employment was terminated on July 15, 1973 (174a). He was then receiving a salary of $47,500. He is admitted to practice in the Southern District of New York (60a).

Bregman claims now that though not a purchaser of any of the Kaplan shares he has a special right by virtue of the agreement of June 17, 1970 to exercise his option to purchase 5,000 shares of ORG stock from Greene at $5.47 and then to immediately require ORG to repurchase all of such shares at current

book value of approximately $12.75 per share, which would give him an immediate profit, as claimed in his counterclaim, of $50,000 and interest (27a).

The complaint therefore asked for a declaration determining the rights of the parties, decreeing that Bregman is not entitled to exercise the Greene option after the termination of his employment and that in any event he is not entitled to resell to ORG any shares purchased from Greene except at the same purchase price of $5.[illegible] per share (15a, 16a).

STATEMENT OF FACTS

Depositions of Bregman and Randall were taken by plaintiffs' attorneys. Randall's deposition was taken in three installments. At the close of his testimony on the first installment plaintiffs' attorneys told defendant's attorneys, then the firm of Weil, Lee and Bergin, and Randall that the latter's testimony probably subjected him and the Weil firm to disqualification (55a). We were asked by Mr. Weil then to defer moving for disqualification until the conclusion of Randall's testimony because they had some questions to ask him and we agreed to this procedure (180a).

Randall had refused to answer a number of questions about the communications between him and Bregman upon the ground of attorney-client privilege (179a). A motion was then made by plaintiffs to compel answers to the questions to which objections had been taken. The affidavit in support of the

motion, sworn to October 30, 1974, showed that Randall had signed as vice president of ORG all of the agreements for the purchase of shares of ORG by the other top executives (175a); that Bregman did not sign any such agreement because he had refused to purchase any such shares (175a); that Randall prepared the special Bregman contract of June 17, 1970 which,it is claimed, gave Bregman the right to acquire Greene shares under the option agreement and immediately sell them to ORG at a much higher value (176a). The affidavit further showed that Randall occupied the dual position in the matter first as house counsel representing ORG and NCK and secondly as the lawyer for Bregman the moment his own employment terminated (177a). References to Randall's testimony showed that he claimed to be "co-counsel for Mr. Bregman" with the Weil firm who were the attorneys of record; the switch which he made was on the date of termination of his employment, July 15, 1973, by which time he was considered by Bregman and himself (and indeed by the Weil firm) to be "a free man"; he said he had "no qualms about it whatsoever"; he had three or four meetings with "co-counsel", the Weil firm, starting in November 1973 and which included a discussion at their office about this pending action; he said that he intends to bill Bregman for fees from July 15, 1973 (Bregman too had testified that if billed he intended to pay Randall fees from that date - 184a); he was called upon for advice by Mr. Weil or his associate, Mr. Hafner, and gave it to them or to Bregman who was present at the talks on one or two occasions (178a).

The question whether he had rightly claimed attorney-client privilege in refusing to answer questions turned on whether he had the right to withhold answers when his client Bregman himself had testified fully and freely on the same matters (179a, 180a).

Annexed to this affidavit was testimony of Bregman on deposition (181a-185a) which showed that he intended to pay Randall for services rendered since July 15, 1973; that he claimed the right to acquire stock of ORG under the Greene option at $5.47 a share and tender it to ORG at current book value for an immediate profit (184a); that he thought that the other top executives also had the same right because Randall had so advised him but he "didn't think Norman believed it" (185a).

Upon a showing that Bregman had testified freely on the subject and that Tom Myers, another of the top executives and not a client of Randall's, was present at the time of Randall's conversation with Bregman it was concluded by defendants' attorneys that the Randall failure to answer questions on the ground of privilege was ill-taken and it was not necessary to pursue this motion further.

REPORT OF MAGISTRATE

Then Randall's deposition was resumed and two further sessions took place. At the conclusion of his testimony the motion to disqualify both Randall and the Weil firm was made which resulted in the decision appealed from. The motion to disqualify was first referred to Magistrate Raby who filed a

report recommending the disqualification of Randall and holding in abeyance the question of whether the Weil firm should also be disqualified because of the pendency of a motion for summary judgment that they had made in which they claimed that Bregman's rights depended upon the construction of written agreements and would not involve the revelation of any confidential information. The report therefore suggested that the motion for summary judgment be first decided, including plaintiffs' right to summary judgment, by which time one of two things would happen: either judgment would be granted for the plaintiffs, in which case "whatever present concern the plaintiffs may have respecting representation of Bregman by the Weil firm would obviously disappear amid the joy of victory"; or if summary judgment were granted to defendant it would be upon the ground that the documents spoke for themselves and shut out any communications between Randall and the Weil firm.

The opinion of the Magistrate posed the question whether there was impropriety in the "representation of Bregman by the Weil firm by reason of consultations which admittedly occurred between the Weil firm and Mr. Randall" (192a). It further said that "the mere fact that the Weil firm conferred privately with Randall concerning the merits of this case, knowing full well of Randall's past services as an attorney for NCK, was, in my view, an error of judgment to say the least . . ." (192). It distinguished Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F. dd 1190 (2d Cir. 1974), upon which the Weil firm relied in its claim that it had not been the previous attorney for

NCK or ORG by saying (193a):

> "Here, however, when we are dealing with Mr. Randall, we are not dealing with a litigant, but rather with a former attorney for one of the parties to the instant litigation, who has apparently been assisting the attorneys for the opposing party in preparing a defense to the action. This is clearly not a matter of 'self-defense'. Since as already noted, it would be highly improper for Randall who at one time characterized himself as 'co-counsel' for Mr. Bregman to represent or continue to represent Mr. Bregman, it would be equally improper for him to confer privately with the firm who is presently representing Mr. Bregman. Since that firm is aware of Randall's prior representation of NCK, I regard it as improper that the dialogues which occurred between the Weil firm and Randall concerning this case were permitted to occur."

JUDGE MOTLEY'S DECISION

When Judge Motley decided the matter she passed on the three motions then outstanding: motions by each side for summary judgment and the motion to disqualify Randall and the Weil firm (2a-10a). The court denied both motions for summary judgment "because of unresolved issues of material facts" (4a). A claim was made by plaintiffs in their moving papers for summary judgment that Bregman, as senior vice president and a director of ORG and as president and director of its wholly owned subsidiary NCK, owed ORG a fiduciary duty which he failed to exercise in allowing himself to be named as a beneficiary of the Greene option without notifying ORG of the existence of the June 17, 1970 contract, which was unique and which was claimed to have been forgotten by the representatives of ORG at the time

the option was given to Bregman. This raised a question, the court said, as to the states of mind of the parties on this question and left unsettled questions of material facts. The court was particularly impressed with the decision in the case of Globe Woolen Co. v. Utica Gas and Electric Co., 224 N.Y. 483 (1918) as to whether, in his dealings with ORG Bregman had obtained a "harsh advantage to the detriment of his trust" and whether he had breached his "constant duty * * * to protest and renounce if through the blindess of those who treat with him he gains what is unfair". If that proved to be so and if Bregman knew that he was obtaining a harsh advantage the contract with Greene would be subject to "an enforced surrender * * * if it turns out to be improvident" (5a).

As to the motion to disqualify the Weil firm,as well as Randall, who changed sides once his employment as house counsel terminated and "conferred concerning the merits of this litigation with the attorneys of record for defendant, Weil, Lee & Bergin", the court held that it did not matter whether in fact the attorney received confidential information during his former employment; Randall, "despite this intimate involvement with the affairs of ORG and NCK, immediately upon termination of his employment * * * undertook to represent defendant Bregman in the very matters on which he had formerly worked for NCK (8a). During the course of such representation Randall consulted with the Weil firm, which was eventually to become counsel of record in the present case, and he consulted with both the Weil firm

and the defendant Bregman on their defense and counter-claim in this case" (8a). The state of mind of both parties at the time of the transactions in question is important and "Randall's representation of defendant flies in the face of Canons 4 and 9, and he must be disqualified from further participation in this matter" (8a).

As to the Weil firm they too, the court held, must be disqualified. "While that firm at no time actually represented either of the plaintiffs to this action, their admitted consultation with Randall regarding this case places them in the same position as if they had." While Randall had not participated for NCK "in the actual litigation now at issue, his work on the transactions underlying such litigation makes his present involvement equally culpable. Nor can he now represent to the court that he was not an 'assistant counsel' in this particular case, since the evidence shows that, whatever title he might choose for himself, his activities on behalf of the defendant in conjunction with the Weil firm were sufficient to disqualify both him and said firm from further participation in this action" (9a).

As authorities the court cited only two cases, Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973) and Hull v. Celanese Corporation, 513 F. 2d 568 (2nd Cir. 1975). The decisions cited are ample precedent for the determination of this case. The Emle case goes into the general principles at great length and is authority for the

proposition that actual receipt or revelation of confidences is not required and that a lawyer must avoid even the appearance of impropriety. Even more to the point is the Hull case, where the District Court said that "a law firm was disqualified for taking on as a plaintiff-client in a sex discrimination suit an attorney who as house counsel to the corporation being sued had originally worked on the defense" and where it was noted that "the firm in question would also have been disqualified had the former house counsel joined the firm as an assistant counsel in the particular case rather than as a client (513 F.2d at 572)".

THERE HAS BEEN NO ABUSE OF DISCRETION BY THE DISTRICT COURT; TO THE CONTRARY ITS DECISION WAS CLEARLY RIGHT.

As appellant correctly observes in his brief cases of this kind will not be reversed except if there has been an abuse of discretion. There might also be added to these observations the statement in the Hull case, 513 F. 2d at 571, that "Moreover, in the disqualification situation, any doubt is to be resolved in favor of disqualification".

Although the Weil firm represented Randall before and had many conferences with him on both his deposition and the disqualification question, this appeal is taken only by them in their own behalf.

This is a clear case wherein it must be said that not only was there no abuse of discretion on the District

Court's part but the facts and conclusions therein are incontestably correct. This is shown not only by the affidavit of Mr. Bisco in support of the motion to disqualify but also on Randall's own deposition, forewarned as he was before commencing the second and third sessions, that a motion would be made to disqualify him and the Weil firm. As will be seen, there are a number of significant changes in his testimony made after this warning and indeed, unfortunately, there are also errors and omissions that are made in the affidavit of Mr. Weil and the brief which he has filed on this appeal.

On the sequence of litigation events, appellants would have it appear that they decided to sue only Greene since neither Randall nor Weil had represented him before and that this was the first step in the arena of litigation. The contrary is proved by the Weil affidavit printed at pages 163a and 164a which shows that the first step was the mailing to Mr. Weil of a copy of the summons and complaint in the action for declaratory judgment brought by ORG against Bregman. This was on January 8, 1974. They held the summons and complaint because they said they had no authorization to appear for Mr. Bregman and on January 17, 1974 they brought suit against Mr. Greene, serving him with papers at his home in Florida.

Randall was active throughout in the intermeshing of affairs dealing with the purchase of Kaplan shares at $5.47 each by Mr. Greene and the top executives of ORG except Bregman himself and the options granted by Greene to these top executives

as well as to Bregman to purchase Kaplan shares from him at $5.47 a share. In fact Randall is the one who signed as vice president the agreements for the purchase of the Kaplan shares by the other top executives. Randall also dealt with the agreement with Greene dated August 31, 1972 granting an option to the top executives and to Bregman to purchase 5,000 ORG shares each at $5.47 per share. Randall was the one who prepared the June 17, 1970 agreement with Bregman which is so crucial, in fact is the only basis for any case by Bregman. He knew that Bregman had refused to put up any money to purchase Kaplan shares yet he was the only one who had whatever advantage the agreement of June 17, 1970 conferred upon him.

When the Greene option agreement of August 31, 1972 was signed Randall knew, or perhaps he momentarily forgot (there was considerable sparring about this), that Bregman had the advantage of his June 17, 1970 agreement (219a-224a).

Randall had differences with Mr. Norman prior to his discharge, which he did not want to go into, but he remained friendly with Bregman, driving to work with him every day from Connecticut and visiting with him socially many times (225a).

Randall not only signed the agreement with the other top executives for purchase of the Kaplan shares but made a number of changes therein before signature, changes which he described as aesthetic and only for the purpose of clarification (252a - 256a).

Though he knew that everyone but Bregman would have to wait for 36 months of employment before being entitled to receive current book value from ORG on the repurchase of their shares he did not mention the special agreement of June 17, 1970 which Bregman had to either Mr. Winkler, the outside lawyer for ORG, or to Mr. Beresford who was active in the closing of the transactions (229a, 230a).

When he advised Bregman as his lawyer, first claiming attorney-client privilege, which he first said was in October 1973, about his right to exercise the option in case of Bregman's resignation he had looked again at the June 17, 1970 agreement and expressed the opinion that Bregman would probably have the right to exercise the Greene option upon his resignation (226a - 228a). That was probably his opinion also when Greene gave the option agreement of August 31, 1972 if "I had been called upon to render such an opinion" (228a). In short he did not think about the June 17, 1970 agreement at the time of the Kaplan-Greene transactions and never told Beresford, Winkler or anyone else about Bregman's possible rights (229a). Nor did he later tell anyone in ORG or Winkler about his opinion when his recollection was refreshed (if it was) (230a).

Randall went to Weil's office with Bregman in the latter part of October or early November 1973 (200a). Weil was told all about him; he knew exactly who he was and what his part was in the case (235a). He participated with Weil in drafting the letter of November 5, 1973 by Bregman to Greene

in which the first attempt was made to exercise the option (236a, 237a). He then continued to work with Mr. Weil and visited his office three or four times for the purpose of discussing the declaratory judgment action and for giving advice (201a, 202a, 237a, 238a).

All of the foregoing was brought out at the second session of the deposition. At the third session he explained that the minutes of the December 15, 1972 Board meeting of ORG referring to a paper signed by Mr. Bregman might have been wrong although he usually did not make mistakes (241a). Then he changed his prior testimony by saying that he was not going to bill Bregman for services in the litigation (242a) and he tried, unsuccessfully we think, to change the meaning of his previous testimony that he was co-counsel with the Weil firm (242a - 247a). He was asked several times whether it was really true that he had "no qualms" about changing his representation to Bregman and he repeated at some length that he had no reasons to make any changes (281a, 282a). He described himself as merely an "errand boy" in making changes in the purchasing agreement signed by the other top executives which he himself signed as vice president (252a - 256a). He then remembered that his first contact with Mr. Weil, whom Mr. Bregman had engaged, was on October 16, 1973 and he explained to Mr. Weil that under all the circumstances he saw no problem about representing Bregman in his claims against ORG (260a - 263a, 280a)

(Mr. Bregman who had employed Randall the moment he was discharged and Mr. Weil who was retained to handle the litigation also apparently saw no problem in Randall's switching of sides and were content to work closely with him throughout.)

Then he changed his previous testimony in which he had denied any meeting in July 1973 to say that there was such a meeting with Mr. Bregman at Randall's home and he gave a written opinion to Bregman of which a copy was given to Mr. Weil. A copy of that opinion so far as pertinent, appears at 66a - 68a and it closes with the statement quoted in Mr. Bisco's affidavit (65a).

A clearer case than this - of an exact switch of representation in the same matter on which the attorney had previously worked to take the other side of the case against a former employer and to work closely with the firm which was employed to handle the litigation - can hardly be imagined. More than a "substantial relationship" between the matter formerly worked on and the new retainer of the lawyer this was a case where it was exactly the same relationship except on the opposite side of the fence. As this court said in Emle Industries Inc. v. Patentex, Inc., 478 F. 2d 562, 575, the court has a duty not only to the litigants but "to the public as well. These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession

and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct".

What should the Weil firm have done under the circumstances? Clearly, as was pointed out in Hull v. Celanese Corporation, 513 F. 2d 568, knowing all about Randall and what his previous work had been they "should have declined representation when approached" (p. 572); they should not have gone ahead and worked closely with Randall as they did.

IN ANSWER TO APPELLANT'S POINT I

In appellant's rather lengthy brief they attempt to give several reasons why disqualification of the law firm was wrong and was an abuse of discretion. First they say (Point I) that if a disqualified law firm never represented either of the adverse litigants actual rather than presumed impropriety must be shown. The simple answer to this is that it is just not so. There is no basis for the opinion expressed at page 26 of appellant's brief after several pages of analysis of the Hull case. They describe Hull as affirmatively holding "that absent actual transmittal of such information by the former attorney to the new one, the latter will not be disqualified on the basis of the former's possession thereof". We find no such holding in the Hull case. To the contrary, as this court observes in the Hull case at page 572: "Had Delulio joined the firm as an assistant counsel in the Hull case, they would have been disqualified. Here she joined them, as it were, as a

client. The relationship is no less damaging and the presumption in Emle should apply".

This seems to be a point of some fascination for the Weil firm. In fact, before the reversal in Redd v. Shell Oil Co., 518 F. 2d 311 (10th Cir. 1975), as described at pages 19 and 20 of appellant's brief, they even urged before the District Court that the motion to disqualify the Weil firm was outrageous and that counsel for the plaintiffs should be made to bear the costs of the proceedings (they no longer claim this since the Court of Appeals reversed this position in the Redd case). Counsel seems to have been acting under the mistaken belief that only an attorney who was the previous attorney for one of the litigants could be disqualified. This is not so under a number of cases on the subject. (See, for example, the discussion above as to the holding in the Hull case.) By way of further example, in Meyerhofer v. Empire Fire and Marine Insurance Co., 497 F.2d 1190, 1196 (2nd Cir. 1974) while this court reversed an order of the District Court which disqualified a firm of attorneys because of their "tainted association" with an employee of the former firm it was only because the disclosures made by this attorney, if not made, would "eviscerate the right of self-defense" conferred by Canon 4 of the Code of Professional Responsibility. An attorney may reveal otherwise confidential information to resist "an accusation of wrongful conduct" but if not revealed for that purpose, it would be "a tainted association" with the attorneys to whom revealed and would subject them to disqualification (p. 1196). Incidentally,

the Meyerhofer case contains the complete text of Canons 4 and 9 of the Code of Professional Responsibility of the American Bar Association which were described in Cinema 5 Ltd. v. Cinerama Inc., 528 F. 2d 1384 (2nd Cir. 1976) as being "recognized by both Federal and State Courts as appropriate guidelines for the professional conduct of New York lawyers." (p. 1386) That case also holds at page 1387 that if a lawyer is disqualified his partners are disqualified as well - an instance of the frequent vicarious operation of the principles of disqualification.

Leading up to appellant's Point I a number of statements are made which are not supported by the record or the applicable law. For example, at page 1 it is said "Randall never had represented Bregman in the within action, although he had served on occasion as Bregman's personal legal advisor after having left his post as house counsel with Org." It is not the fact that Randall had never represented Bregman in the present action. When he was retained on July 15, 1973, the moment he was discharged, he was retained for all purposes. He became co-counsel with the Weil firm when they were retained and he discussed, worked on and advised both on the exercise of the option, the validity of which is involved in this law suit, and on various phases of this declaratory judgment action.

In dealing with dates at pages 3 and 4 of their brief, counsel forget what is later stated on page 11, that the

first step in the litigation area was on January 7, 1974 when a copy of the summons and complaint in the declaratory judgment action brought by ORG against Bregman for a declaratory judgment was sent to them and then later, on January 17,1974, they brought an action against Greene in Florida.

It would make no difference that neither party, Randall or the Weil firm, had been Greene's lawyer because the suit against him, even if brought prior to the declaratory judgment action, is based simply on the agreement of June 17, 1970 which supposedly gives a high value to the shares of Organization which Greene refused to deliver. Again this flashes upon the June 17, 1970 agreement, for nobody, with the possible exception of Randall and Bregman, had it in mind at the time of the Kaplan-Greene transactions in August 1972. Obviously Greene was giving his option at the same price at which he bought the Kaplan shares because he wanted to preserve continuity of management. But since Norman, who dealt with Greene, knew nothing about the June 17, 1970 agreement at the time, neither did Greene know about it and therefore he gave the option to Bregman under a false assumption.

As for Kaplan, he may or may not have known about it but this is immaterial since Kaplan is on the opposite side of the case, being the seller of the shares of which ORG, Greene and others were purchasers.

At pages 9 to 11 a sequence of events is stated in appellant's brief indicating the supposed lack of contact

between Randall and Weil. The circumstance is omitted that in the early November meeting Randall participated in the drafting of Bregman's letter of November 5, 1973 to Greene invoking his option rights and then testified that he had several other meetings with the Weil firm at which he discussed the declaratory judgment action.

IN ANSWER TO APPELLANT'S POINT II

In Point II of appellant's brief the argument is made that Randall's contacts with the Weil firm "were too remote from participation in the within litigation to raise any question even under Canon 9".

This has already largely been answered. The facts show otherwise. There was complete association and team-work between Randall and the Weil firm even through the taking of the Randall deposition. The cooperation was close and constant. The association was tainted from the beginning. The wonder is that no one saw this but always felt free to act. Not Bregman, not Randall, not the Weil firm.

IN ANSWER TO APPELLANT'S POINT III

Point III of appellant's brief is that Randall did not really act as counsel to Bregman in matters substantially related to the issues in this case and if he had they would not have been of a nature confidential or secret "as against Bregman".

The answer to this is two-fold. Randall was counsel

to ORG and the present attempt to downgrade his position to a mere clerk or errand boy must fail. See Cord v. Smith, 338 F. 2d 516, 524 (9th Cir. 1964) and Consolidated Theatres v. Warner Bros. Cir. Man. Corp.,216 F. 2d 920, 927 (2nd Cir. 1954).

Whether or not it was confidential or secret as against Bregman is not the question. Was he ORG's lawyer is the real question. Whether Norman or the others connected with ORG had "institutional amnesia" (appellant's br. p. 39), whether there was a duty to refer to corporate records which they had forgotten, whether the company was chargeable with "indifference or neglect" (appellant's br. p. 38) is also not the question. Randall knew about the contract of June 17, 1970, Bregman knew about it, the others did not know or had forgotten or were never told. The question then is whether either Bregman or Randall as fiduciaries had the duty "to protest and renounce if through the blindness of those who treat with him he gains what is unfair". Globe Woolen Co. v. Utica Gas and Electric Co., 224 N.Y. 483, 492 (1918) [emphasis supplied] If they fail to speak they take the "risk of an enforced surrender of his bargain if it turns out to be improvident" (id p. 490).

IN ANSWER TO APPELLANT'S POINT IV

In Point IV argument is made that it would be unfair to Bregman to deprive him of counsel of his own choice. This is always the problem but in this case Bregman, though not a lawyer, was equally guilty in hiring Randall to represent him against his former client in the same matter that he had

previously worked on. The right to choose counsel is subordinate to the court's protection of the adverse litigants and of the public.

CONCLUSION

THE DECISION BELOW WAS CORRECT
AND SHOULD BE AFFIRMED.

Dated: New York, N.Y.
May 4th, 1976

Respectfully submitted

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Of Counsel
Leonard G. Bisco

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this day of MAY 1976

.....
Attorney for APPELLANT